(22)

In the Supreme Court of the United States

OCTOBER TERM, 1916

No. 296

CHARLES J. MEYER, Defendant in Error,

vs.

THE ARROW COMPANY,

Plaintiff in Error.

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In the Supreme Court of the United States

October Term, 1943.

CHARLES J. MACH, Debtor, *Petitioner,*

vs.

THE ABBOTT COMPANY, a Corporation, *Respondent.*

No. ———.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Charles J. Mach, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit entered in the above-entitled cause on June 21, 1943.

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Preliminary Statement.

This case arose under the Frazier-Lempke Act and on appeal taken by the debtor, petitioner, from a decision of the District Court of the United States for the District of Nebraska, not officially reported, entered on May 29, 1942 (R. 118-122). The District Court in its order or judgment, without finding that all of the conditions set forth in Section 75(s)(1) of the Bankruptcy Act (11 U. S. C. A., Sec. 203 [s][1]) had been complied with, began the three-year stay period, provided under Section 75(s)(2) of the Bankruptcy Act (11 U. S. C. A., Sec. 203[s][2]), on March 22, 1940, the date the appraisal was filed, rather than on May 29, 1942, the date the order or judgment was entered. In addition, the District Court held that rentals began on October 27, 1938, under a previous ruling of the court, and as a result the debtor was delinquent in rentals. The debtor, petitioner, appealed from this order and judgment and the case came to the Circuit Court of Appeals for the Eighth Circuit. The judgment of the Eighth Circuit Court of Appeals rendered on June 21, 1943 (R. 136-144), affirmed the judgment or order of the District Court in retroactively beginning the three-year stay period on March 22, 1940, for the reason that the debtor had filed a motion before the District Court stating that the three-year stay period should begin on March 22, 1940, and as a result the debtor could not maintain an appeal to reverse or modify the judgment order or decree because he had secured all the relief that he had sought. The Circuit Court of Appeals, however, modified the District Court's judgment or decree by

beginning the payment of rentals on March 22, 1940, rather than on October 27, 1938.

Facts.

The facts upon which the Circuit Court of Appeals rendered its decision (R. 136-140), concisely stated, are as follows: January 10, 1938, the District Court entered an order adjudging the petitioner, the petitioner herein, a bankrupt (R. 2) under Section 75(s) of the Bankruptcy Act.

On October 27, 1938, the District Court, without an appraisal being made, granted a three-year stay order and further ordered that the debtor pay rentals from and after that date (R. 36). Appraisers were appointed on February 6, 1940, and the report of appraisers was filed on March 22, 1940 (R. 40-43). The debtor remained in possession of the land during the three-year period after the entry of the stay order on October 27, 1938, and paid the rent as provided by the order for the first two and a half years of the period (R. 107, 138). On December 16, 1941, The Abbott Company, the mortgagee creditor, filed an application in the proceedings alleging that the three-year stay period had expired on October 27, 1941 (R. 104-109). The debtor, on his own behalf, on February 17, 1942, filed a motion, stating that the three-year stay period began from the filing of the appraisal of the property (R. 114). At the hearing on the application on May 13, 1942, the District Court set aside the order of October 27, 1938, in beginning the three-year stay period on that date and in its order, entered on May 13, 1942, but filed on May 29, 1942, retroactively began the three-year stay period on March 22, 1940, and further found that rentals were due from October 27, 1938 (R. 118-122).

The Circuit Court of Appeals refused to decide the question whether the District Court erred in retroactively beginning the stay order by applying the rule that one who secures by a judgment order or decree all the relief he seeks or one who complains of error for which he himself is responsible, cannot maintain an appeal to reverse or modify or review the proceedings on which such judgment was founded. The Circuit Court of Appeals, however, modified the District Court's order and began the payment of rents on March 22, 1940, rather than on October 27, 1938.

The court below failed to consider, in rendering its decision, that on March 9, 1940, new counsel entered his appearance on behalf of the petitioner (R. 115), that the District Court ordered, on April 22, 1942, further showings and arguments of the date or dates the stay order commenced (R. 117), and that said counsel argued on May 13, 1942, that the stay period began on the date of the court's order (R. 148, 149). That the District Court was fully appraised of said counsel's position is shown by the fact that eight days before the District Court filed its written order on May 29, 1942, that said counsel filed a notice of appeal on May 21, 1942, which specifically states that the three-year stay order begins on the date of the court's order (R. 123).

B.

Question Presented.

The questions presented are, first, whether the District Court's judgment or decree filed May 29, 1942, is void by not finding in said judgment or decree that all the conditions set forth in Section 75(s)(1) of the Bankruptcy Act had been complied with and by beginning, in said

judgment or decree, entered on May 13, 1942, and filed May 29, 1942, the three-year stay period on March 22, 1940; second, whether the record taken as a whole reflects that the debtor petitioner appealed from a judgment or order in his own favor; third, whether the debtor petitioner cannot at any time collaterally attack the void judgment or decree of the District Court and thereby has not waived his right to appeal; and fourth, whether rentals begin on May 29, 1942, the date the District Court filed its order beginning the stay period, or on March 22, 1940, the date the court in its order filed May 29, 1942, began the three-year stay period.

C.

Jurisdiction.

Jurisdiction to review the judgment of the Circuit Court of Appeals in this case is conferred upon this Court by the provisions of Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. A. 347[a]).

The judgment of the Circuit Court of Appeals for the Eighth Circuit was rendered on June 21, 1943 (R. 136-144) and the petition for rehearing (R. 145-153) was denied on July 21, 1943 (R. 155).

D.

Reasons Relied on for Allowance of Writ.

1. In holding that the District Court judgment or order was valid and not void (by refusing to pass upon the question and affirming the District Court) in retroactively beginning the three-year stay order provided for in Section 75(s) (2) of the Bankruptcy Act on March 22, 1940,

the date the appraisal was filed rather than on May 13, 1942, the date the judgment or decree of the District Court was entered, the Circuit Court of Appeals has decided a federal question in a way directly in conflict with the controlling decision of this court in *Borchard* v. *California Bank*, 310 U. S. 311, 84 L. Ed. 1222, 60 S. Ct. 957, and directly in conflict with that of the United States Court of Appeals for the Tenth Circuit in the case of *Paradise Land & Livestock Co.* v. *Federal Land Bank*, 118 F. (2d) 215.

2. In holding that the District Court judgment or order was valid and not void (by refusing to pass upon the question and affirming the District Court), in automatically beginning the three-year stay period on March 22, 1940, the date the appraisal was filed without a judgment order on that date, and by retroactively beginning the stay order on May 29, 1942, without first finding that all of the conditions set forth in Section 75(s) (1) of the Bankruptcy Act have been complied with, the Circuit Court of Appeals has decided a federal question directly in conflict with that of the United States Court of Appeals for the Ninth Circuit in the cases of *Hardt* v. *Kirkpatrick*, 91 F. (2d) 875, 878, certiorari denied 303 U. S. 626, 58 St. Ct. 762, 82 L. Ed. 1088; and *Bernards* v. *Johnson*, 103 F. (2d) 567, 571, affirmed 313 U. S. 537, 85 L. Ed. 1507, and in direct conflict with that of the United States Court of Appeals for the Tenth Circuit in the case of *Paradise Land & Livestock Co.* v. *Federal Land Bank, supra.*

3. In failing to consider all the facts in the case which clearly reflect that the District Court's attention was directed, at the hearing held May 13, 1942, to the fact that the debtor's (petitioner's) position at that time was that the three-year stay period began on the date of the court's order and not at the date of filing the appraisal, the Cir-

cuit Court of Appeals erred in holding that the debtor petitioner appealed from a judgment in his own favor or was responsible that said judgment or order was rendered by the District Court.

4. In holding that the debtor petitioner cannot collaterally attack or maintain an appeal from the void judgment or order of the District Court, the Circuit Court of Appeals has decided a question directly in conflict with the controlling decisions of this court in *Windsor* v. *McVeigh*, 93 U. S. 274, 282, 23 L. Ed. 914, 917; *Hovey* v. *Elliott*, 167 U. S. 409, 446, 42 L. Ed. 215, 231, 17 S. Ct. 861; and Note 39 L. R. A. 449; *Ex. Parte Rowland*, 104 U. S. 604, 26 L. Ed. 861, *Ex parte Lange*, 18 Wall. 163, 21 L. Ed. 872; and in direct conflict with the decision of the Circuit Court of Appeals for the District of Columbia in the case of *Fishel* v. *Kite*, 101 F. (2d) 685, 687.

5. In holding that the debtor petitioner waived his rights under Section 75(s) (1) (2) (3) of the Bankruptcy Act by his motion dated February 17, 1942, and refusing to pass on whether or not a proper and orderly procedure was had in this matter under these sections, the Circuit Court of Appeals has decided a federal question in a way directly in conflict with the controlling decisions of this court in *Wright* v. *Union Central Life Ins. Co.*, 311 U. S. 273, 85 L. Ed. 185; *John Hancock Mutual Life Ins. Co.* v. *Bartels*, 308 U. S. 180, 84 L. Ed. 186, 60 S. Ct. 221; and *Borchard* v. *California Bank, supra.*

6. In holding that rentals on the property involved began on March 22, 1940, instead of May 29, 1942, the date of the District Court's order, the Circuit Court of Appeals has decided a federal question in a way directly in conflict with the language used in the statute involved, Section 75(s)(2) of the Bankruptcy Act.

E.

Prayer for Writ.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify and send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the cause entitled and numbered on its docket, *Charles J. Mach, Debtor, appellant,* v. *The Abbott Company, a Corporation, appellee,* No. 12422, In Bankruptcy; that the judgment of the Circuit Court of Appeals for the Eighth Circuit in said cause may be reviewed by this Honorable Court; and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Respectfully submitted,

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